

No. 12727

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
of WEST COAST CABINET WORKS, INC.,

Appellee.

PETITION FOR REHEARING.

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*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

The undersigned, your petitioner, respectfully submits that it has been aggrieved by the Opinion of Your Honors rendered herein on the 21st day of August, 1951, and by the concurring Opinion herein dated August 27, 1951, in the respects hereinafter set forth, and prays for a rehearing of said matter:

1. Neither of the aforesaid Opinions take into account all the facts fully set forth with appropriate transcript references in Appellant's Opening Brief, pages 3-8, inclusive. No mention is made in either of the aforesaid Opinions of the fact that not only did appellee apply for and obtain a permit under the California Sales and Use Tax Law but that appellee was allowed an additional fee for operating the busi-

ness of the bankrupt as trustee. Additionally, no mention is made of the fact that numerous retail sales and sales for resale were made by appellee prior and subsequent to the sale of the five trucks involved herein.

2. With further reference to factual matters, the majority opinion erroneously concludes, without support in the record herein, that upholding the application of the California Sales and Use Tax Law to liquidation sales made by trustees in bankruptcy would foster conflict between Federal and State laws. As was indicated during lengthy oral argument, this conclusion has no basis in fact.

3. The concurring Opinion of the Honorable Judge Fee proceeds on the premise that upholding the application of the California Sales and Use Tax Law to liquidation sales made by trustees in bankruptcy will "burden or impede administration of acts relating to bankruptcies." It is respectfully submitted that this premise cannot be supported. The application of non-discriminatory state taxes (such as the taxes imposed under the California Sales and Use Tax Law) do not, as a matter of fact, burden or impede the administration of bankrupt estates, as recognized by the numerous cases cited by appellant in the briefs heretofore filed.

4. Both Opinions ignore the true nature of the Order made by the District Judge below. That Order permanently enjoins the Board from enforcing any of the provisions of the California Sales and Use Tax Law with reference to the sales made by appellee of the five trucks referred to in the majority Opinion. This point is directed to the Court's attention inas-

much as the California Sales and Use Tax Law, California Revenue & Taxation Code, Division 2, Part 1, effective July 1, 1943, imposes not one tax but *two* taxes. The majority Opinion refers only to the sales tax aspect of the statute and ignores completely the use tax provisions which, in the light of the numerous decisions cited on that point in Appellant's Opening Brief, including the decision of the Second Circuit in *City of New York v. Jersawit*, 85 F. 2d 25, clearly appear to be applicable to liquidation sales made by trustees in bankruptcy.

5. The majority Opinion disposes of appellant's contentions as to lack of jurisdiction without reference to the decision of the United States Supreme Court, decided May 21, 1951, in *Alabama Public Service Commission v. Southern Ry. Co.*, 71 S. Ct. 762, and to the excellent analysis of Federal District Court jurisdiction in the concurring opinion of Mr. Justice Frankfurter. Both the *Lyford* and *Gardner* cases referred to on pages 2 and 3 of the majority Opinion herein deal *not* with tax liabilities incurred during the course of administration but with liabilities existing prior to bankruptcy and set forth by creditors in proofs of claim.

6. Although numerous California cases are cited at page 5 of the majority Opinion to support the proposition that sales made in the process of putting an end to a business are not within the scope of the California statute, it is to be noted that this point was particularly left open in *Los Angeles City High School District v. State Board of Equalization* (1945), 71 Cal. App. 2d 486, 163 P. 2d 485. Furthermore, although the decision of the California Su-

preme Court in *Coca-Cola Co. v. State Board of Equalization* (1945), 25 Cal. 2d 918, 156 P. 2d 1, is cited at page 5 of the majority Opinion, no reference is made to the record herein in so far as it relates to appellant's administrative construction of the statute involved and the portion of the aforesaid decision which provides that such construction "is entitled to great weight, and courts will not depart from such construction unless it is clearly erroneous or unauthorized."

7. In considering the California statute, at least in so far as it pertains to the California Sales Tax, the Court has given no recognition nor effect to the provisions contained in Sections 6006.5 and 6367, which define and exempt certain occasional sales and to the other specific exemption provisions in the statute. This point is directed to the Court's attention in view of the language contained in the decision of the California Supreme Court in *Kamp v. Johnson*, 15 Cal. 2d 187, 191:

" . . . The broad definition of the term 'retail sale' as 'a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property . . . ' compels the conclusion that the tax must be paid at some time with respect to all tangible personal property sold for use or consumption and the sale of which is not specifically exempted from the tax"

8. Both the majority and concurring Opinions cite and rely upon *McCulloch v. Maryland*, 17 U. S. 316, disregarding completely the decision of the United States Supreme Court in *Graves v. People of*

the State of New York, ex rel. O'Keefe, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, the decision of an Illinois District Court in *In re Mid America Co.*, 31 Fed. Supp. 601, and the decision of the Eighth Circuit in *State of Missouri v. Gleick*, 135 F. 2d 134.

9. Also ignored by the majority and concurring Opinions is the latest expression of opinion by the United States Supreme Court in *Alabama Public Service Commission v. Southern Ry. Co.*, *supra*, with reference to the scrupulous regard for the rightful independence of state governments which should at all times actuate the Federal Courts even in matters dealing with regulation rather than, as is the case in the instant appeal, the application of a non-discriminatory tax. (See, also, *Bird & Jex Co. v. Anderson Motor Co.*, 92 Utah 493, 69 P. 2d 510, cited in Appellant's Opening Brief at pages 30 and 31.)

As counsel indicated to the Honorable Court during the course of the lengthy oral presentation of this matter, the application of the California Sales and Use Tax Law with respect to liquidation sales made by trustees in bankruptcy is a matter of great concern not only to appellant but also to the bankruptcy referees and trustees in this jurisdiction. It was the sincere endeavor of counsel for appellant in their presentation of the instant appeal to present for the Court's full consideration all of the legal and factual issues involved in a situation which is fairly typical for the purpose of putting to rest once and for all the uncertainties involved. By failing to consider all the issues presented in the light of the cited decisions of

the United States Supreme Court and decisions in other Circuits, the Opinions rendered in the instant appeal would appear to indicate that in this Circuit, perhaps, a strict application of *McCulloch v. Maryland, supra* (see *Collector v. Day*, 11 Wall. 113, 20 L. Ed. 122), is still in order—although it would hardly appear at this late date, and especially in view of the decision in *Graves v. People of the State of New York, ex rel. O'Keefe, supra* (306 U. S. 466), that this Honorable Court so intended to infer.

Wherefore, petitioner respectfully urges that a rehearing be granted and that the mandate of this Court be stayed pending the disposition of this Petition.

Respectfully submitted,

CALIFORNIA STATE BOARD OF EQUALIZATION,

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Attorney General,

JAMES E. SABINE,

Deputy Attorney General.

EDWARD SUMNER,

Deputy Attorney General,

Attorneys for Appellant.

Certification.

I, Edward Sumner, Deputy Attorney General of the State of California, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing Petition for Rehearing in the case of California State Board of Equalization, Appellant, v. George T. Goggin, Trustee in Bankruptcy of the Estate of West Coast Cabinet Works, Inc., Appellee, is well founded and is not presented for the purpose of creating a delay.

EDWARD SUMNER.

